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THE ONTARIO HUMAN RIGHTS CODE,

R.S.O. 1970, Chapter 318, as amended

IN THE MATTER OF

The complaint made by Mr. Walter Hyman of Toronto, Ontario, alleging discrimination in employment and reprisal by the Southam Murray Printing, 2973 Weston Road, Weston, Ontario

AND IN THE MATTER OF

The complaint made by Mr. Walter Hyman of Toronto, Ontario, alleging discrimination in employment and reprisal by the International Brotherhood of Teamsters Local 419, 1194 Matheson Blvd., Mississauga, Ontario

A HEARING BEFORE:

Professor John D. McCamus
Appointed a Board of Inquiry into the above matters by the Minister of Labour, The Hon. Robert Elgie, to hear and decide the above mentioned complaints.

Appearances:

Mr. A.C. Millward	
Mr. D.A.J. D'Oliveira,	Counsel for the Ontario Human Rights Commission and Mr. Walter Hyman
Mr. C.A. Morley, Q.C.,	Counsel for Southam Murray Printing
Mr. D.J. Wray,	Counsel for International Brotherhood of Teamsters, Local 419

DECISION ON PRELIMINARY OBJECTIONS

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to nearly [illegible]

Printing, as the [illegible]

[illegible]

On that sa[illegible]

the Minister [illegible]

Hymer against [illegible]

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(b), (c) (d) [illegible]

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the [illegible]

first complaint [illegible]

In essence [illegible]

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which Mr. [illegible] man [illegible]

employer acted in [illegible]

n the other hand. [illegible]

On May 18, 1981, I was appointed to serve as a Board of Inquiry under the Ontario Human Rights Code by the Minister of Labour, the Hon. Robert Elgie, to hear and decide a complaint made by Mr. Walter Hyman against Southam Murray Printing, as the latter is referred to in the formal Appointment and in the complaint in question. The complaint alleges that the respondent has engaged in discrimination in employment contrary to Section 4 (1)(b)(g) of the Code. As will be seen, Mr. Hyman has, in fact, lodged two complaints against the respondent Southam Murray Printing. The second of the two complaints repeats substantially the allegations made in the first complaint, however, and therefore appears to be the complaint which constitutes the principal subject matter of the appointment of May 18.

On that same date, I was appointed as a Board of Inquiry under the Code by the Minister to hear and decide the complaints brought by the same Mr. Walter Hyman against the International Brotherhood of Teamsters, Local 419 alleging discrimination in employment and reprisal contrary to 4a (1) and Section 5 (a)(b)(c)(d) on the grounds set forth in subparagraph (e)(f)(g)(h) of that Section. Again, Mr. Hyman had lodged two grievances against the respondent union and the latter of the two repeated the substance of the allegations made in the first complaint.

In essence, the complaints made by Mr. Hyman against the respondent employers relate to a series of incidents, culminating in his dismissal, in which Mr. Hyman alleges various servants and agents acting on behalf of the employer acted in a discriminatory manner. The complaints against the union, on the other hand, relate to Mr. Hyman's dissatisfaction with the manner in

which the union responded to Mr. Hyman's request for assistance in gaining redress with respect to some of the aforementioned incidents. Having reviewed the contents of the four complaints and having come to the conclusion that the evidence relating to the complaints against the employer would be substantially similar to the evidence relating to the complaints against the union in the sense that it would likely involve, for the most part, the same witnesses testifying with respect to the same events, I determined that it would be appropriate to convene a hearing which would entertain submissions and evidence with respect to both of these matters. Accordingly, notices of a hearing to be held on August 19, 1981 were forwarded to the parties to both matters and a hearing was convened on that date.

At the commencement of that hearing, Mr. Morley, counsel representing the respondent employer, and Mr. Wray, counsel representing the respondent union, indicated that they both wished to raise a number of preliminary objections. The objections raised on behalf of the respondent employer were as follows:

1. That the matter should not be permitted to proceed further because of the delay already occasioned in the initiation and/or the processing of the complaint.

2. That the subject matter of the complaint should be considered to be res judicata by reason of the earlier proceedings before a Board of Arbitration under the chairmanship of Professor Kenneth P. Swan, which culminated in the release of an award dated July 3, 1979.

3. That the jurisdiction of the Board of Inquiry is confined to dealing with one complaint and that it would be improper in any event for the Board of Inquiry to deal with complaints against more than one respondent in the same proceeding.

Counsel for the respondent employer further indicated that for the purposes

of the initial determination with respect to these objections by this Board of Inquiry, the employer would rely simply on the statements made on the face of Professor Swan's award and would not call detailed evidence concerning the arbitration proceedings underlying the award.

On behalf of the respondent union, it was similarly objected that the proceedings should be dismissed on the basis of undue delay in the initiation or prosecution of the complaints. An additional objection to the proceedings of the present Board of Inquiry was made on behalf of the respondent union in the following terms:

> 4. That the complaints pertaining to the union disclosed no violation of the Ontario Human Rights Code by the Trade Union and, in particular, disclosed no violation of Section 4a (1) of the Code.

Further, with respect to the third preliminary objection raised by the respondent employer, it was the submission of the respondent union that the complaints against both respondents should be heard together and that the complaints should, in this sense be consolidated.

The preliminary objections of both respondents are the subject matter of this interim decision.

A further preliminary matter may be conveniently mentioned at this time. At the commencement of the hearing, counsel for the Commission and for the respondent employer indicated that the respondent employer has not been identified by its proper name in the complaints and, further, indicated their consent to an order of the Board amending the complaints so as to refer to the respondent

employer as "Southam Murray Printing Division of Southam Printing Limited". An order to this effect was made at that time.

II

Before turning to a consideration of each of the preliminary objections raised by the respondents, it will be useful to set out a brief chronology of the events alleged to have occurred in the four complaints filed as exhibits in these proceedings, together with certain other facts suggested by documents filed by counsel for the respondent employer. It may be useful to emphasize that the following chronology is not, of course, in any sense to be considered a set of factual findings by this Board of Inquiry. The merits of the preliminary objections taken by the respondents must be measured, however, against the background of the alleged series of events giving rise to these complaints. The chronology of alleged events indicated in these sources, is, then the following:

1. September, 1973 — Mr. Hyman commenced work as a porter for the respondent employer. From the beginning, he perceived that he was required to do more than one person's work and was, in other ways, discriminated against. Approximately two months later, Mr. Frank Laposta commenced work as a porter and began to provoke and harrass Mr. Hyman.

2. 1976 — Mr. Hyman complained with respect to the continuing conduct of Mr. Laposta to his foreman, Mr. Ken Cook. Mr. Cook spoke to Mr. Laposta but the latter's behaviour continued.

3. June 23, 1977 — Mr. Hyman made a further complaint concerning Mr. Laposta's conduct to the plant superintendent, Mr. Herb O'Connor.

Mr. O'Connor promised to convene a meeting between Mr. Hyman and Mr. Laposta.

4. June 27, 1977 — Instead of the promised meeting, Mr. Hyman was called to a meeting at which his foreman, Mr. D. Anderson accused him of causing trouble with Mr. Laposta. Mr. Hyman was not allowed to have either a witness to the incident or his shop steward present at this meeting. Mr. Hyman was given a written warning relating to this incident.

5. July 8, 1977 — Mr. Hyman filed a grievance with the respondent union relating to items 3 and 4 above.

6. July 12, 1977 — In Mr. Hyman's absence and without his consent, the respondent union dropped the July 8 grievance. Subsequent complaints by Mr. Hyman to the union and further meetings resulted ultimately in action on the part of the union which led to a withdrawal of the letter of warning referred to in item 4.

7. July 19, 1977 — First Complaint Against the Employer. Mr. Hyman lodged a complaint under the Ontario Human Rights Code against the respondent employer recounting the facts relating to items 1, 2, 3, and 4 above and alleging that these facts constituted evidence of discrimination with regard to employment because of race and colour.

8. Subsequent weeks — The Ontario Human Rights Commission investigated the complaint referred to in item 7. Mr. Hyman states that the

respondent union was not as helpful as it should have been in assisting the individuals undertaking this investigation.

9. December, 1977 — Mr. Hyman was suspended by the respondent employer for two days as a result of a complaint made by Mr. Hyman that white co-workers were throwing boxes at him. Mr. Hyman filed a further grievance with the respondent union relating to this incident and alleges that the union representatives were unsympathetic to his complaint.

10. February 8, 1978 — First Complaint Against Respondent Union. Mr. Hyman lodged a grievance under the Ontario Human Rights Code against the respondent union recounting the facts relating to items 5, 6, and 8, and alleging that the union's failure to adequately represent him amounted to discrimination on the basis of colour and race in contradiction of Section 4a (1) of the Code. The complaint contains no allegation with respect to the period of time during which the investigation took place.

11. February 17, 1978 — As a result of the filing of the third complaint against the union, Mr. Hyman was called to a meeting of union officials allegedly intimidated and referred to by obscene and racial names by the president of the union.

12. September 12, 1978 — Mr. Hyman was given a work assignment by his foreman which he refused to undertake on medical grounds. Mr. Hyman's foreman complained to Mr. O'Connor and the latter ordered him to undertake the assignment in question. Upon Hyman's refusal to do so, Mr. O'Connor sent him home, using a racial slur in communicating this decision to Mr. Hyman. On the advice of his shop steward, Mr. Hyman went home and returned two days later with a medical certificate. Mr. Hyman was suspended for three days for using obscene language which he maintains he did not use. Upon his return to work Mr. Hyman was given a further work assignment which he undertook under protest, again on medical grounds and kept up this job for two weeks.

13. September 29, 1978 — Mr. Hyman visited the employer's physician who was, in Mr. Hyman's view, unsympathetic to his medical complaint. Again, on the advice of his union steward, Mr. Hyman went home in order to obtain a medical certificate.

14. September 30, 1978 — Mr. Hyman returned to work but was informed by the plant security personnel that they were under orders not to admit him to the plant. Two days later, Mr. Hyman was informed that he was fired and two weeks later received written notice to that effect. This letter made reference to his past record and to previous warnings which

were supposed to have been removed from his file.

15. Subsequently — Thereafter, at a date not indicated in documents filed before this Board of Inquiry, Mr. Hyman grieved his dismissal with the respondent union.

16. January 29, 1979 — A hearing was convened before a Board of Arbitration with respect to Mr. Hyman's grievance of the September dismissal. The respondent union allegedly did not adequately present the facts relating to discriminatory conduct to the Board of Arbitration.

17. July 3, 1979 — Arbitration Award relating to items 15 and 16 is issued.

18. November 21, 1979 — Second Complaint Against Respondent Employer. Mr. Hyman lodged a complaint under the Ontario Human Rights Code recounting the facts relating to items 1, 3, 4, 7, 9, 12, 13, and 14 and alleges that these facts constitute discrimination in employment because of race, colour, nationality, ancestry and place of origin, contrary to Section 4 (1)(b)(g) of the Code. Mr. Hyman alleged that the arbitration award referred to in item 17 had not yet become available.

19. November 21, 1979 — Second Complaint Against Respondent Union. Mr. Hyman filed a complaint under the Ontario Human Rights Code

recounting the facts relating to items 5, 6, 7, 9, 10, 11, 12, 14, 15 and 16 and alleging that these facts constitute evidence of discrimination because of race and colour contrary to Section 4a (1) of the Code and further alleging that the respondent union violated Section 5 (a)(b)(c)(d) of the Code.

It is possible, of course, that some or all of the foregoing allegations made by Mr. Hyman may be false. Indeed, documents filed as exhibits as counsel for the employer may be said to create, on their face, some conflict with respect to some of the statements made in the complaints lodged under the Code by Mr. Hyman. Nevertheless, for purposes of reviewing the legitimacy of the preliminary objections of the parties, it is in my view necessary to assume that the allegations in fact made by Mr. Hyman are potentially provable.

Against this background, then, I turn to consider each of the preliminary objections made by counsel for the respondents in turn.

III

The first preliminary objection taken by counsel for the respondent employer, with which counsel for the respondent union concurred, relates to the alleged delay in the initiation and prosecution of these complaints. It is the submission of the respondents that as a result of what is said to be unreasonable delay in both aspects of the progress of these matters that this Board of Inquiry has a basis for exercising a discretion to dismiss each of the complaints now before it. Counsel for the Ontario Human Rights Commission and the complainant,

on the other hand, have submitted that a Board of Inquiry properly appointed under the provisions of the Ontario Human Rights Code has no discretion to dismiss a complaint on such grounds and, in any event, that the delay in the present case not being, it is alleged, unreasonable would not constitute grounds for exercising such a discretion in the present case.

The legal analysis underlying the respondents' submissions draw heavily on an analogous doctrine which has developed in the context of grievance arbitrations conducted pursuant to the provisions of collective agreements. In a number of reported labour arbitration decisions, arbitrators have determined that in the absence of clear guidance in the terms of the collective agreement itself, arbitrators have a discretion to dismiss grievances or declare them to be inarbitrable because of undue delay. See generally Brown and Beatty, Canadian Labour Arbitration (1977) pp. 84-85; Palmer, Collective Agreement Arbitration in Canada (1978) pp. 159-163. Although there was at one time some controversy as to whether or not the existence of unreasonable delay would deprive a labour arbitrator of the jurisdiction to hear a grievance, it now appears to be settled law that unreasonable delay does not deprive the arbitrator of jurisdiction but rather creates a basis for exercising a discretion to dismiss the grievance. See, Re Ottawa Newspaper Guild, Local 205, and The Ottawa Citizen (1965) 55 D.L.R. (2d) 26. In the Ottawa Citizen case, Chief Justice Gale indicated that the proper approach to be taken by arbitrators was to examine the collective bargaining agreement "to see whether the parties intended to bar employees, or others affected, from remedy if responsible for unreasonable delay, and if so, then of considering whether there had been unreasonable delay in the circumstances of this case as disclosed by the evidence ..." (at p. 28).

Arbitrators have consistently viewed the Ottawa Citizen decision as judicial confirmation of the power of labour arbitrators to dismiss grievances for unreasonable delay. Thus, in Re Oil, Chemical & Atomic Workers, Local 9-672 and Dow Chemical of Canada Ltd. (1966), 18 L.A.C. 50 at p. 55, Professor Arthurs commented that "a careful reading of the Court's decision leaves untouched the basic premise that grievances must move promptly to arbitration, even in the absence of specific time limits in the collective agreement".

Labour arbitrators have offered essentially two justifications for the application of a principle of unreasonable delay. Some arbitrators have emphasized the labour relations context in which grievance arbitrations arise and have suggested that inasmuch as both parties to the agreement share an interest in efficient resolution of disputes, reasonable time limits should be read into the collective agreement where no specific time limits are set forth therein. Thus in the Dow Chemical case, supra, Professor Arthurs commented as follows (at p. 55);

> Prompt adjustment of grievances is naturally of great importance in maintaining amicable labour-management relations. Unions have often complained of the corrosive effect of unresolved grievances of individuals who feel themselves wronged, but are unable to secure speedy redress because of management evasion or delay. Indeed, this common place observation is recognized by the recital in art. 5.01 that "it is of the utmost importance that adjustment of complaints and grievances should be made as speedily as possible". The whole grievance procedure, then, is based on a premise of reasonable speed ... the one thing that the agreement does not contemplate, then, is that grievances should exist indefinitely in a state of suspended animation. Yet the possibility exists that a dormant grievance may be revised after weeks, months or even years, unless a board of arbitration has power to hold it time-barred.

Other arbitrators have emphasized the unfairness which may result if grievances are arbitrated after a period of delay which is so lengthy as to create problems of proof for one of the parties to the dispute. In Re United Automobile Workers, Local 80, and Honeywell Controls Ltd. (1971) 22 L.A.C. 310, for example, the Board noted that the passage of time had created prejudice to the company in its ability to produce evidence relating to the incident in question and went on to comment as follows (at p. 312):

> Because of the union's delay in proceeding with this matter, a fair hearing has become impossible since the employer has been substantially prejudiced in the presentation of its case. Also, as stated, a further factor indicating prejudice to the company is that the grievance on an unjust suspension or discharge involves a continuing liability on the company which should be resolved as quickly as possible following this submission of the grievance. It is clear to us that in these circumstances the matter of the grievor's suspension which was the subject of this grievance is not arbitrable. We would emphasize that our determination on this point is no mere "technicality"; requirement of a fair hearing lies at the very route of the notion of justice, and it is precisely this which the union, by its delay, has denied the employer.

The "labour relations" rationale suggested by Professor Arthurs might itself provide a basis for dismissal of a grievance even in the absence of evidence of prejudice to a party's ability to prove its case. Thus in the Dow Chemical case, the grievance was dimissed as it appeared that the processing of the grievance by the union had been delayed in order to secure a tactical advantage with respect to the resolution of other grievances. For the most part, however, arbitrators have emphasized the need for the party claiming unreasonable delay to establish that some prejudice has resulted from the delay. See, for example,

Re International Longshoreman's Association, Local 1654, and Shipping Federation of Canada, Inc. (1967) 18 L.A.C. 174 (important witnesses no longer available).

Some labour arbitrators, in explaining the nature of this doctrine of unreasonable delay, have drawn an analogy with the equitable doctrine of laches. See, for example, Re Dow Chemical, supra and Re Parking Authority of Toronto and Canadian Union of Public Employees, Local 43 (1974), 5 L.A.C. (2d) 150. For present purposes, however, it is important to note that whether or not the equitable analogy is useful support for the doctrine of unreasonable delay, the imposition of a standard of this kind on the arbitration of disputes may, in certain cases, represent a considerable restriction of the rights which employees would otherwise have enjoyed at common law. Thus, for example, where a grievance arbitration amounts in substance, to the adjudication of an alleged wrongful dismissal, no similar principle of unreasonable delay would apply to the employee's cause of action in contract for damages for wrongful dismissal. A claim for damages of breach of contract would be time-barred under The Limitations Act, R.S.O. 1970, c. 246, sec. 45 (1)(g) only after six years. If the employee in question had a tort claim against his employer, it would be time-barred after six, four or two years depending on the nature of the tort in question. No doubt the more extensive remedial scheme available to employees under the collective bargaining agreement represents a clear gain over the employee's position at common law. My point, however, is that the unreasonable delay rule which has developed in the context of labour arbitration and which is analogous to a similar doctrine operating with respect to certain claims in equity is not one which has broad application to disputes between

employees and employers at common law. When turning to consider the appropriateness of time limitations on other types of disputes between employers and employees it is not self-evident, then, that the rules which have been developed in the context of grievance abritration are more appropriate than those that have been developed to deal with claims at common law.

In summary, then, the thrust of the position advanced by the respondents is that the doctrine of unreasonable delay developed in the context of grievance arbitration should be read into the provisions of the Ontario Human Rights Code or, at least, should be considered to be the basis of a discretion which a Board of Inquiry duly appointed under the Code can exercise in an appropriate case. It has been submitted on behalf of the Commission and the complainant, on the other hand, that the absence of any reference in the Code to a limitation period for the initiation or prosecution of complaints must be taken as evidence of a statutory intention that no such limitation be imposed. Accordingly, it is their view that a Board of Inquiry has no jurisdiction under the Code to dismiss a complaint at the commencement of proceedings on the basis of alleged unreasonable delay. Some support was drawn for this submission from the various provisions of the Code providing for the appointment of Boards of Inquiry. Thus, Section 14c provides that the Board shall after hearing a complaint "decide whether or not any party has contravened this Act". Further, Section 14b(6) provides that "the board of inquiry has exclusive jurisdiction and authority to term any question of fact or law or both <u>required to be decided in reaching a decision as to whether or not any person has contravened this act</u> ...". It was suggested that a careful reading of these provisions suggests that a Board of Inquiry cannot make determinations of fact or law which

would permit it to decline to make a decision as to whether or not a contravention of the act has occurred in a particular case. The Board of Inquiry, once appointed by the Minister of Labour is driven to conduct its inquiry and reach a conclusion on this question regardless of any delay in the proceedings or in the initial filing of the complaint occasioned by the conduct of one of the parties. The only exception to this conceded by Commission counsel is that afforded by Section 4 of The Statutory Powers Procedure Act, S.O. 1971, c. 47, which enables a tribunal whose proceedings are governed by that act to conclude a proceeding without a hearing in circumstances where the parties consent or otherwise agree to the termination of the proceedings. Further, it was suggested that after hearing the evidence relating to a complaint, the Board of Inquiry might in some fashion take into account any prejudice caused to a respondent as a result of delay either in fashioning or denying a remedy, or perhaps, in making findings of fact.

My own view is that there is considerable force in these submissions made on behalf of the Commission at least insofar as they reject the possibility of dismissing complaints merely because of the passage of time. Under Section 14a of the Code the Minister is given a discretion to appoint a Board of Inquiry to hear and decide a particular complaint. One of the facts that will be evident to the Minister on the face of the complaint is the amount of time which has passed between the alleged incidents and the initiation of the formal complaint. Once the Minister has appointed a Board of Inquiry to "hear and decide the complaint", it would be a surprising interpretation of the mandate conferred on the Board of Inquiry that would permit it to dismiss the complaint without making a decision as to its merits on the basis of the facts which must have

been apparent to the Minister at the time of making the appointment. I note that the U.S. Supreme Court has, for different reasons, come to a similar conclusion with respect to the applicability of limitations rules to the operation of analogous provisions of Title VII of the Human Rights Act of 1964. See Occidental Life Ins. Co. of California v. E.E.O.C. (1977), 97 S. Ct. 2447, 432 U.S. 355.

To hold that no limitations period is applicable to complaints brought under the Code, does not dispose of the question of whether or not some principle akin to the equitable doctrine of laches could be relied on in this context. Indeed, it is of interest to note that equitable claims were, for the most part, exempt from limitations statutes and the doctrines of laches and acquiesence (together with a willingness of the Courts of Equity to apply the statutory limitations periods by analogy) constituted Equity's version of the limitations rules. See, generally, Preston and Newsom's Limitation of Actions (3rd ed., 1953) c.10. If the common law analogy of a limitation period based simply on the passage of time is inappropriate, should a board of inquiry turn to the equitable doctrines - in which detrimental reliance appears to play an important role - so as to have some basis for dismissing stale claims?

My own view is that while unreasonable delay might be a factor to be taken into in refusing or fashioning a remedy (see, on this point, Albemarle Paper Co. v. Moody (1975), 422 U.S. 405 at 424-425, 95 S. Ct. 2362, at 2374-2375), or in weighing the persuasive force or credibility of testimony or other evidence, delay in initiating or processing a complaint should not be considered a basis for dismissing the complaint at the outset of the proceedings before a board of inquiry unless it has given rise to a situation

in which the board of inquiry is of the view that the facts relating to the incident in question cannot be established with sufficient certainty to constitute the basis of a determination that a contravention of the Code has occurred. Having been assigned, by order of the Minister of Labour, a statutorily defined task of undertaking an inquiry to ascertain certain facts, the board of inquiry should proceed to attempt to do so, notwithstanding the passage of considerable time, unless the passage of time has made fulfillment of its task impossible. In the absence of such, admittedly unlikely, circumstances, the proper course, in my opinion, is for the board of inquiry to proceed and to weigh the prejudice or unfairness to a particular party which may have been occasioned by delay in making particular findings of fact or in refusing or fashioning a remedy. It may be that a particular respondent may view the appointment of a board of inquiry by the minister or, indeed, the recommendation of the Commission that a board of inquiry be appointed, to constitute an abuse of a discretionary power conferred by statute. That, however, is a matter to be tested in another forum. See, generally, J.M. Evans (ed.), de Smith's Judicial Review of Administrative Action (4th ed., 1980), pp. 322-354; D.J. Mullan, Administrative Law (2nd ed., 1979) pp. 3-165 et seq.

More particularly, it is my view that the jurisprudence which has developed in the labour relations context is not of assistance in the present context. Principles of interpretation of collective agreements are perhaps an unlikely source of doctrines which would be of assistance in the interpretation of the Ontario Human Rights Code. In any event,

it does appear that the doctrine of unreasonable delay there developed has been very specifically rooted in considerations relating to the ongoing relationship between the employer and the union which have no obvious parallel in the context of complaints made under the Code. Many complaints will have nothing to do with the employment context, of course. Further, many employment related complaints will arise in the context of an employment relationship in which there is no collective bargaining regime. It would be perverse, in my view, to impose an unreasonable delay requirement drawn from the labour relations analogy only in that narrow range of cases in which the complainant happens to be a member of a trade union. If a discretion to dismiss complaints on the basis of unreasonable delay could, contrary to my view, be exercised by boards of inquiry, the discretion would not be one which should be exercised in precisely the same way as that exercised by labour arbitrators. It may be good labour relations policy to encourage prompt resolution of disputes. There is no evidence in the provisions of the Code of a similar concern for the promptness of dispute resolution.

On the view I take of this matter, however, it is not necessary to reach a definite conclusion on this question. Even if one assumes that a principle of unreasonable delay, analogous to that developed in the context of labour arbitration, is applicable to complaints lodged under the Code, I am not satisfied that unreasonable delay has been established on the facts of the present case. The initiation of proceedings for limitations purposes in these cases has been determined by the Ontario Divisional Court to arise when the complaint is initially filed by the complainant. See Metropolitan Board of Commissioners of Police and Superintendent William Dickson v. Ontario Human Rights Commission and Harjit Singh Ahluwalia, unreported, September 20, 1979.

The chronology of facts set out in Part II of this decision indicates that the first complaint against each of the respondents was filed relatively promptly after the occurrence of the events which allegedly constituted discrimination. The first complaint against the employer was filed within a month of the meeting with Mr. Anderson and presumably some part of that month was absorbed in the communication of a written warning to the complainant. The first complaint against the union was lodged within what would appear to be less than six months after the alleged unresponsiveness of the union with respect to the July 8, 1977 grievance. Again, some unspecified amount of that time must have been consumed by the alleged failure of the union to cooperate in the investigation of the complainant's first complaint against the employer. With respect to the second complaint lodged against each of the respondents, a greater period of delay is evident on the face of the complaints. Slightly more than a year passed between the time of the dismissal in September, 1978 and the filing of the second round of complaints in November, 1979. Much of that time was absorbed, however, by the grievance arbitration process. In my view it would not be unreasonable either for the complainant or the Commission to determine that further proceedings with respect to the complaints should be deferred until the ultimate disposition of the grievance arbitration. If the grievance had been successful, either the complainant or the Commission might have wished to recommend that the proceedings under the Code be terminated. And, even if one assumes, contrary to the statements made by Mr. Hyman in his complaints, that a copy of the arbitration award was made available to Mr. Hyman in July of 1979, I would not hold that the additional four months or so which expired before the complaints were lodged constitutes an unreasonable period of delay.

The more important point with respect both to the initiation and processing of these complaints, however, is that neither the respondent employer nor the respondent union have established that any significant prejudice has resulted from either form of delay. The labour arbitration cases to which counsel have referred indicate that the kind of prejudice taken into account by labour arbitrators normally relate either to problems of proof arising, for example, from the unavailability of witnesses, or from strategic or tactical considerations arising in the context of the ongoing collective bargaining relationship. Considerations of the latter type would not be relevant in the present case. With respect to the former type of prejudice, counsel for the employer has indicated that a number of witnesses whom he would wish to present to this Board of Inquiry are no longer employees of the respondent employer. This would not, in itself, establish sufficient prejudice for the exercising of a discretion of this kind. It has not been suggested that any important witnesses are no longer available or that there are otherwise insurmountable problems of proof confronting either of the respondents.

For the foregoing reasons, then, it is my view that the principle of unreasonable delay which has been developed in the context of labour arbitration has no applicability to the disposition of complaints lodge under the Code and that, further, there is not in any event such unreasonable delay in the present case as would engage that principle.

IV

The second preliminary objection made by the respondent employer raises a question of res judicata or issue estoppel. It has been argued that the grievance arbitration decision of the Board of Arbitration chaired by Professor Swan, referred to at items 15, 16, and 17 of Part II of this decision has already canvassed the issues relating to the alleged discrimination of the employer and, inasmuch as Mr. Hyman's grievance was dismissed by that Board of Arbitration, Mr. Hyman and the Commission ought to be estopped from challenging the conclusions reached by that Board of Arbitration. The question of the effect, if any, to be given to a prior arbitration award in the context of subsequent proceedings before a Board of Inquiry appointed under the Human Rights Code dealing with essentially the same dispute between the parties is one which has given rise to some difficulty in the past both in Ontario and in the United States where a similar problem arises under Title VII of the Human Rights Act of 1964. Where, as in the present case, a discharged employee believes that his discharge has been motivated by discriminatory attitudes, a grievance of the discharge brought under the provisions of the governing collective agreement between the employer and the union may well have the effect of determining whether the allegations of bias are well-founded or whether, on the other hand, the employer can establish just cause of the dismissal which is untainted by considerations of this kind. If the employer successfully upholds the discharge in the arbitration proceedings, it is perfectly understandable that the employer may feel that the possibility of enduring further proceedings in which the same matter will be litigated before a Board of Inquiry is unfairly burdensome. Having established its bona fides in one forum,

the employer will feel it to be oppressive to be required to do so in a second. Quite apart from the employer's interest in avoiding, in effect, being sued twice with respect to the same alleged default, there is an evident public interest in bringing an end to the litigation of disputes between parties and in avoiding the prospect of inconsistent decisions being reached with respect to the same dispute by different tribunals. These broad principles of public policy have, of course, found their expression in the rules of res judicata and issue estoppel and there is obviously some force in the employer's argument that these principles should operate in the present context.

The subject matter of the grievances of Mr. Hyman brought before the Board of Arbitration chaired by Professor Swan were the three day suspension on September 14, 15, and 18, 1978, referred to in item 12, Part II of this decision and the discharge of Mr. Hyman by the employer on September 29, 1978 referred to in item 14. In discussing the former of these two incidents the arbitration award, filed in these proceedings as Exhibit 12, states the following:

> Mr. O'Connor says that the grievor complained that he had been told to pick up the waste, and in doing so referred to the operator by an expression generally thought to be insulting and obscene. Mr. O'Connor says that the grievor attributed his assignment to do an unpleasant job to the fact that his skin was black. The grievor denies these allegations, and says that Mr. O'Connor, in fact, uttered a racial slur in a low voice, and hence unheard by any bystanders, during the course of the argument. Our carefully chosen polite phrases do not entirely convey the flavour of the discussion which was clearly loud, profane and angry. It is now impossible for us to decide just what was said

> by whom, but we do feel bound to say, that despite the allegations the grievor had made, there is no evidence before us on which we could conclude that Mr. O'Connor exhibited racial discrimination or that the company's actions in this case were motivated by discrimination on racial grounds.

The award then goes on to consider the evidence relating to the three day suspension in greater detail, makes an unfavourable finding with respect to Mr. Hyman's credibility and reaches the conclusion that Mr. Hyman's conduct on this occasion was a just cause for discipline and that the discipline imposed was not inappropriate in the circumstances. The award then proceeds to consider the evidence relating to the discharge and, again, after making an unfavourable finding with respect to Mr. Hyman's credibility reaches the conclusion that the discharge was effected for just cause. It is the employer's submission, therefore, that the gravamen of the second complaint brought under the Code against the employer was directly raised before the Board of Arbitration and was found to be not substantiated by the evidence. Although it is conceded that the subject matter of the first complaint lodged under the Code against the employer was not before the Board of Arbitration the employer argues that inasmuch as that matter was ultimately resolved through an earlier grievance process in favour of Mr. Hyman (as indicated in item 6, above), it would be a pointless and wasteful exercise to attempt to determine whether Mr. Hyman had initially been treated, with respect to that incident, in a discriminatory fashion by an individual acting on the employer's behalf. In short, then, there is some merit in the submission of the employer that the essential nature of the dispute raised before this Board of Inquiry was raised before the Board of

Arbitration and rejected.

On the other hand, there are considerations of general principle which auger against the operation of res judicata rules in this context. Moreover, there are considerations specific to the present case which suggest that even if res judicata rules should have some sweep in this context, they ought not preclude further proceedings relating to the matters before the present Board of Inquiry.

It is my view that the effect of permitting previous grievance arbitration awards to engage the principles of res judicata would undermine the objectives of the Ontario Human Rights Code and, at the same time, would provide an undesirable disincentive to the use of grievance arbitration as a means for resolving employment related disputes which involve, perhaps amongst other factors, allegations of discriminatory treatment. A comparison of these two institutional devices for dispute resolution indicate that there are a number of advantageous features to the remedial scheme set out in the Ontario Human Rights Code which have no parallel in the grievance arbitration process. A complaint lodged under the Ontario Human Rights Code is taken to a public body, the Ontario Human Rights Commission, whose exclusive mandate is to investigate such complaints and seek their resolution. Prosecution of the complaint by the Commission is uncomplicated by any ongoing relationship between the Commission and the respondent in a particular case. In the grievance arbitration context, however, the parties to the arbitration are, of course, the employer and the union. It is established labour relations law that the union has control over the carriage of the grievance and thus, for example, is

permitted to settle or withdraw the grievance at any time without the consent of the individual grievor. To be sure, the union could not refuse to process a grievance on discriminatory grounds without exposing itself to redress under Section 60 of the Ontario Labour Relations Act, R.S.O. 1970, c. 232. But the union may have other legitimate reasons for not pursuing the grievance as aggressively as the grievor might wish. As the Ontario Labour Relations Board noted in a decision dealing with Section 60, "we think it clear that the union's obligation to administer the collective agreement gives it the right to settle grievances. An employee does not have an absolute right to have his grievances arbitrated ...". See Gebbie v. UAW and Ford Motor Co. [1973] O.L.R.B. 519 at p. 526. Again, the Commission is unencumbered by considerations of this kind in determining whether or not to vigourously pursue the rights of an individual who has lodged a complaint under the Code.

Secondly, it is to be noted that the rights of appeal are different in the two contexts. The parties to a hearing before a Board of Inquiry is entitled to a full de novo review on questions of law or fact or both on an appeal to the Supreme Court of Ontario under Section 14d of the Code. The standard of judicial review of labour arbitration decisions is much more limited in its scope. A third difference between the two schemes may be found in the remedial powers of an arbitrator as opposed to a Board of Inquiry. Although it is true that arbitrators possess broad powers to reinstate dismissed employees and award appropriate compensation or, under Section 37 (8) of the Labour Relations Act "substitute such other penalty for the discharge or discipline as to the arbitrator or arbitration board seems just and reasonable in all the circumstances", the remedial powers

conferred on a Board of Inquiry under Section 14c of the Code appear to be much more extensive. In fashioning remedies pursuant to those powers, Boards of Inquiry have typically attempted to achieve not only the immediate objective of compensation for the injury sustained but also preventive measures designed to prevent their recurrence.

Further, it should be noted that the remedies available to an aggrieved union member under Section 60 of the Labour Relations Act who complains of a failure of adequate representation in a grievance process are less accessible to the aggrieved individual than are the remedies afforded by the Ontario Human Rights Code. The prosecution of a complaint under the Code will be undertaken by the Commission at public expense and thus will represent what is for the most part cost-free adjudication of the dispute as far as the complainant is concerned. The aggrieved party pursuing a complaint under Section 60 of the Labour Relations Act would, however, face substantial cost disincentives to proceeding against the union.

Finally, it must be noted that the nature of the investigation which may be undertaken by the Human Rights Commission may be of a significantly different quality than that undertaken in preparation for the arbitration of a grievance. The Commission has been assigned extensive powers of investigation under Section 14 of the Code. Moreover, the Commission is no doubt intended by the legislation to be a body which develops expertise in the investigation and conciliation of human rights disputes. It may be hoped that the Commission will develop a sensitivity to the kinds of evidence which might be useful in substantiating a claim of discrimination which may not be shared by those who only occasionally engage in the investigation of this kind of dispute.

More generally, when one examines the scheme set forth in the Ontario Human Rights Code, it becomes evident that the legislature has developed a comprehensive and accessible scheme for the enforcement of human rights. I would be reluctant to accede to an application of res judicata principles which would render that scheme less accessible to members of trade unions, or at least, to those members of trade unions who take the quite reasonable course of first pursuing the remedial scheme most familiar and immediately available to them, i.e. grievance arbitration under the collective agreement.

In addition to this policy of favouring recognition of rights of access to the remedial scheme of the Code for aggrieved individuals, the provisions of the Code also manifest the presence of a public interest in the investigation and resolution of discriminatory conduct which stands apart from the immediate interests of the individual complainant. Thus, for example, under Section 13 (3) of the Code, the Commission is empowered to initiate a complaint on its own motion. Even in the absence, then, of an individual prepared to lodge a complaint and seek its resolution, the Commission has a mandate to seek fulfillment of the broad principles of public policy set out in the preamble to the Code on its own motion.

An examination of the role assigned to the Commission by the Code also indicates that the problem of inconsistent verdicts or decisions cannot be swept away through the operation of res judicata principles. If one of the arguments supporting the application of res judicata is that respect for the administration of justice will be decreased by the phenonomen of inconsistent

verdicts, it must be noted that in the human rights context, it appears to be inevitable in cases of this kind that there will be a sense in which inconsistent verdicts have been pronounced by the time a Board of Inquiry has been appointed to hear and decide the complaint. Under Section 14 (1) of the Code, where a complaint has been filed with the Commission, the Commission must make an inquiry into the complaint and attempt to achieve a settlement. Where it appears that the complaint cannot be settled, the Commission may recommend to the Minister that a Board of Inquiry be appointed. The complainant has no direct access, then, to the Board of Inquiry mechanism. The evident purpose of the statute is that a screening function of some kind be performed by the Commission at this stage of the investigation of the complaint. The frustrations of an individual who perceived himself to be the victim of racial discrimination would be seriously intensified if, after his complaint has been investigated and subjected to this screening process by the Commission, a Board of Inquiry were to conclude that it was precluded from investigating the matter as a result of a prior and unsuccessful grievance arbitration. Although the individual's complaint was unsuccessful in the grievance process, a public body charged with the investigation and enforcement of human rights in the province has come to the conclusion that further litigation of the dispute is worthy of public support through the mechanisms established in the Code.

In summary, the comprehensiveness and the accessibility of the enforcement mechanisms established by the Code, together with the specific role assigned to the Commission by the Code strongly suggests a legislative intention which is inconsistent with the idea that boards of inquiry would be precluded from conducting an investigation, once appointed, by the result of a previous

grievance arbitration. These factors, together with the absence of any explicit direction on this point in the Code itself, lead me to the conclusion that any rights which may be conferred on an individual through a collective bargaining regime to seek resolution of complaints of discrimination in the workplace must be considered to be additional to those rights conferred by the Code and should not be considered to restrict the accessibility of the remedial scheme of the Code to individuals covered by such schemes.

I would also draw some support for this conclusion from the implications which, in my view, can be drawn from the public policy evidenced in the Ontario Labour Relations Act of encouraging the use of labour arbitration as a device for the resolution of disputes in the workplace. Section 37 (1) of that act requires that "every collective agreement shall provide for the final and binding settlement by arbitration ... of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement ...". I would be reluctant to adopt an application of the res judicata rules which would have the effect of providing a disincentive for the use of this mechanism. Were I to hold, however, that individuals whose human rights complaints were dismissed through the grievance arbitration process could not then invoke the remedial scheme of the Human Rights Code, I would provide an incentive for thoughtful victims to bypass the arbitration process completely and seek directly to invoke the more comprehensive and advantageous remedial provisions of the Code. If, on the other hand, a negative decision in the grievance arbitration process carries no risk for the victim of discrimination, there will be no reason to resist using this more accessible and informal process to seek a resolution of the dispute. Labour

relations policy thus appears to provide an additional ground for treating rights conferred under collective agreements as additional to those conferred by the Human Rights Code. It is of interest that similar sentiments have been expressed by the Supreme Court of the United States in Alexander v. Gardner-Denver Company, (1974) 94 S.Ct. 1011, a case in which the Supreme Court reached the conclusion that a prior grievance ought not to be considered res judicata in the context of subsequent litigation under Title VII of the Human Rights Act of 1964. It was argued in that case that the evident public interest in encouraging the use of labour arbitration might be undermined by a failure to defer to the decisions of arbitrators in these circumstances. The court rejected this argument and commented, in part as follows:

> A deferral rule also might adversely affect the arbitration system as well as the enforcement scheme of Title VII. Fearing that the arbitral forum cannot adequately protect the rights under Title VII, some employees may elect to by-pass arbitration and institute a law suit. The possibility of voluntary compliance or settlement of Title VII claims would thus be reduced, and the result could well be more litigation, not less.

As one might expect, the Gardner-Denver decision has been a subject of numerous law review articles. For a description which emphasizes the present point, see Cone and Henry, Alexander v. Gardner-Denver and Deferral to Labor Arbitration (1976), 27 Hastings L.J. 403. Quite apart from the matter of incentives, of course, many union members will simply turn naturally to their union for support in the face of difficulties of this kind. For the reasons suggested above, it would be inconsistent with what I read as the legislative intent of the Code to penalize those who take this natural and desirable step by depriving them

of rights they would otherwise have under the Code to invoke its remedial provisions.

I draw further support for this conclusion from the decision of Professor Hunter sitting as a Board of Inquiry under the Ontario Human Rights Code in the case of Abihsira v. Arvin Automotive of Canada Ltd. and Markham (1981), 2 C.H.R.R. paras. 2358-2392. In that decision Professor Hunter provides a more detailed account, which I find it unnecessary to repeat here, of the traditional elements of the res judicata doctrine and reaches the conclusion that it is not on a strict reading, applicable to circumstances such as those in the present case. Professor Hunter appeared to be of the view that the issue before a grievance arbitration, being one of interpretation of a collective agreement, must necessarily be different than the issue which arises before a Board of Inquiry charged with the determination of whether or not a contravention of the Ontario Human Rights Code has occurred. Further, Professor Hunter emphasized that the parties to the two different proceedings are not identical and this, indeed, appears to be one of the traditional elements of the res judicata principle. See Re Bullen (1972) 21 D.L.R. (2d) 628 at p. 631, quoting from Spencer Bower and Turner, The Doctrine of Res Judicata (2nd ed. 1969) at pp. 18-19. Finally, Professor Hunter drew considerable support from the decision of the U.S. Supreme Court in the Gardner-Denver case, referred to above. Although I am less persuaded than Professor Hunter that the issue in the two different proceedings must necessarily be different - especially in cases where the collective agreement contains an anti-discrimination clause, it would appear that the same factual and legal issues might be litigated, albeit for a different purpose, before the two tribunals - I do agree with his conclusion that a proper reading of the legislative

intent of the Human Rights Code that requires that the doctrine of res judicata should not be given the effect contended for here by the respondent employer.

Counsel for the respondent employer drew support for his submissions from the decision of another Board of Inquiry, that of Professor Kerr in Singh v. Domglas Limited (1981) 2 C.H.R.R. Paras. 2480-2533. Professor Kerr was also pressed with the relevance of the decision of the U.S. Supreme Court in Alexander v. Gardner-Denver Company, supra. It was Professor Kerr's view, however, that the different status enjoyed by the labour arbitration process under federal labour relations legislation in the U.S. constituted a basis for distinguishing the American precedent. As indicated above, the Ontario Labour Relations Act requires that every collective agreement provide for final and binding arbitration of disputes. As Professor Kerr noted, labour arbitration is a wholly voluntary matter under the American legislation. Professor Kerr went on to note the potential difficulty of the two different tribunals reaching conflicting results and placed some emphasis on the general policy consideration of avoiding excessive legal proceedings. Professor Kerr then suggested that a more appropriate analogy for resolving this issue in the Canadian context would be the approach taken by the National Labour Relations Board in the U.S. to the decisions of arbitrators. Although the Board does not consider itself bound by such decisions, the Board exercises a discretion to defer to the decision of an arbitrator if it is satisfied that the arbitration procedure was fair and regular and that the decision is not clearly repugnant to the purposes and policies of the National Labour Relations Act. In deciding whether or not to defer, the Board will consider whether the principle issues raised in the proceedings before the Board have been actually dealt with by the

arbitrator and whether all parties were bound by the grievance arbitration.

It will be evident from the foregoing discussion that I do not find these views to be persuasive. Although it is true that the arbitration process is not required by the National Labour Relations Act, it is evident that the arbitral process does enjoy considerable support in the U.S. legislation. Thus the U.S. Act, (1970) 29 U.S.C. sec. 173 (d), provides:

> Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective agreement.

Moreover as indicated above, the Supreme Court in the Gardner-Denver case was at great pains to indicate that it was not their intention to undermine the strong public policy favouring labour arbitration by refusing to defer to labour arbitration decisions in Title VII cases. Accordingly, I am not inclined to share Professor Kerr's view that a sharp distinction can be drawn between American and Canadian experience on this basis. Further, when one examines the discretion to defer which Professor Kerr favours, it appears to operate in a manner very similar to that of the res judicata rules. If essentially the same issue has been litigated before the grievance arbitration in a fair and regular manner, the National Labour Relations Board will defer. In such circumstances, traditional res judicata or issue estoppel principles would similarly command deferral. For the reasons elaborated above, it is

my view that a principle of deferral of this kind is inconsistent with the legislative intent evidenced in the provisions of the Ontario Human Rights Code.

In addition to these considerations of general principle, there is one final consideration which arises in the circumstances in the present case which is, in my view, dispositive. One of the allegations made in the complainant's second complaint against the respondent union is that he was not properly represented by the union during the grievance arbitration process and, in particular, that the union failed to raise all the evidence which could have been raised with respect to the issue of discrimination before the Board of Arbitration. At this stage of the proceedings, again, it is necessary to assume that this allegation may be true. On this assumption it would clearly be inappropriate to give weight to the decision of the Board of Arbitration on the theory that it constitutes a fair resolution of the very issue before the present Board of Inquiry. Whatever reach might be given to a principle of issue estoppel or deferral as a more general matter, it would be clearly inappropriate to accede to its operation in a case where the arbitration process is itself alleged to be tainted with discriminatory action or inadequate representation of the interests of the complainant.

V

The third preliminary objection raised by the respondent employer questioned the ability of a Board of Inquiry appointed under the Human Rights Code to hear two complaints contemporaneously and, in any event, argued that any discretion the Board might have to do so should be exercised in favour of

not doing so in the present case. In argument, counsel for the respondent employer placed considerable emphasis on the frequent appearance of the term "complaint" in its singular form in the sections of the Code providing for the establishment of Boards of Enquiry and for the conduct of their proceedings. Moreover, it was urged that the respondent employer would be prejudiced in the present case if the complaints against itself and those against the respondent union were heard at the same time inasmuch as the employer might be placed in the invidious position of having to defend itself against allegations made by the complainant and the Commission on the one hand and by the respondent union on the other. Counsel for the employer hypothesized that the respondent union may wish to take the position that certain actions ascribed to the union by the Comission might be argued by the union to be the responsibility of the employer. To be placed in a position where one must, as it were, defend oneself on both sides, it was argued, creates a situation of prejudice for the employer. Although it was conceded that there may be some convenience to be achieved in hearing all of the complaints together, it was argued that the possible prejudice to the employer was sufficiently grave as to outweigh considerations of mere convenience or expense.

Counsel representing the complainant, the Commission and the respondent union argued, however, that a Board of Inquiry does have the ability to hear more than one complaint at a time and suggested that the present case was one in which it would be appropriate so to do.

Attention was drawn to the similarity of the evidence which would be pertinent to both sets of complaints. Thus, a full exploration of the complaints

against the union would involve an exploration of the work related incidents which form the subject matter of the complaints against the employer. Further, it may well be that evidence relating to the grievances would be of some relevance to the resolution of the complaints made against the employer. Further, it was argued that the very factor relied on as a source of potential prejudice by the employer - the possibility of the union attempting to shift responsibility for certain actions to the employer - provided a substantial reason for conducting hearings relating to all complaints at one and the same time.

The Ontario Human Rights Code does not deal expressly with this point. No express power is conferred upon Boards of Inquiry to consolidate complaints or otherwise hear them together. I am of the view, however, that the ability to hear complaints together must be considered to be a power conferred upon a Board of Inquiry by necessary implication from the provisions of the Code. The very establishment of Boards of Inquiry with certain powers under the Code suggests that they must have the power to control their own procedures subject, of course, to over-riding principles of law such as those expressed in the Ontario Statutory Powers Procedure Act, and, presumably, general principles of fairness. With respect to the question of whether or not complaints should be heard together, the element of fairness would require a balancing of any prejudice sustained or potentially sustained by any of the parties against the public interest in avoiding a multiplicity of proceedings.

The most obvious and appropriate source of guidance with respect to the balancing of these conflicting interests are the rules which have been developed

by the judicial system to deal with questions on this kind. In Ontario, these principles are stated in Rules 66 and 67 of the Rules of Practice of the Supreme Court of Ontario, R.R.O. 1970, reg. 545, as amended, providing for the joinder of causes of action. It is not joinder in the precise sense that is contemplated here; it is not proposed that each of the respondents become parties to the complaints brought against the other respondent. However, in hearing the two complaints together the practical effect would be essentially the same as joinder - the evidence led at the hearing would be heard with respect to all complaints - and, accordingly, the joinder rules appear to be the most appropriate source of guidance. With respect to the joinder of claims brought by one plaintiff against two different defendants - a situation analogous to the present - Rule 67 provides as follows:

> Where the plaintiff claims that the same transaction or occurrence, or series of transactions or occurrences, give him a cause of action against one or more persons, or, where he is in doubt as to the person from whom he is entitled to redress, he may join as defendants all persons against whom he claims any right to relief, whether jointly, severally or in the alternative, and judgment may be given against one or more of the defendants according to their respective liabilities, but the court may order separate trials or make such other order as is deemed expedient if such joinder is deemed oppressive or unfair.

It is to be noted that two different kinds of circumstances are described in Rule 67 as setting up a basis for the joinder of defendants; first, different claims arising out of the same series of occurrences and second, a situation in which the plaintiff is in doubt as to the person from whom he is entitled to redress. Both of these circumstances appear to be present in the series of complaints brought against the respondent employer and the respondent union.

Certainly, the series of occurrences which would form the subject matter of the evidence would be substantially the same for both respondents. Further, the possibility suggested by the employer to be prejudicial that argument may be made by the respondent union to the effect that some actions alleged to be those of the union may more properly be ascribed to the employer suggests that there may be some difficulty in the present case in determining which of the two respondents properly bear responsibility, if any, for alleged conduct. Far from creating prejudice, this circumstance is suggested in Rule 67 as being the kind of situation in which joinder is proper.

In sum, then, it is my view that a Board of Inquiry does have the power to hear more than one complaint at the same time. I note that Professor Tarnopolsky sitting as a Board of Inquiry in the case of Morgan v. Toronto General Hospital, October 14, 1977 has expressed a similar view at pp. 13-15. In weighing the potential prejudice to the respondent employer against the evident interest in avoiding the expense and inconvenience of a multiplicity of proceedings, I come to the conclusion that the latter in the present case, substantially outweighs the former. Indeed, I am not convinced that the alleged prejudice should be considered prejudice for these purposes. Certainly, the general structure of Rule 67 strongly suggests that it should not.

With respect to the particular problem of hearing together two complaints brought by one complainant against different respondents, I draw further support from the provisions of the Code which permit a Board of Inquiry to add parties to a proceeding. Section 14b (1)(e) provides that a Board of Inquiry is entitled to add any other person as a party to a proceeding provided that it gives notice to the

person in question and "such person has been given an opportunity to be heard against his joinder as a party". Further, it should be noted that the Board of Inquiry is required to determine in Section 14c whether any party to the proceeding has contravened the Code and may make orders against any party to the proceeding who has contravened the Code. Thus, it would appear to be possible to add a respondent to a proceeding who is not initially named in the complaint and, ultimately, to make findings with respect to the conduct of that party and make any appropriate order requiring the party to rectify any injury caused by its conduct. Thus, in the present case, it would be possible to add the employer as a party to the complaints against the union and vice versa. As I have not been requested to make such orders, I do not propose to do so at the present time. However, the power conferred upon a Board of Inquiry to make such orders by the Code does strongly suggest that a Board of Inquiry should be considered to be entitled to hear two complaints at the same time. Where there is more than one potential respondent to a complaint, the most open and fair way of proceeding against the additional respondent would be to make an additional complaint against that person rather than to wait until the appointment of a Board of Inquiry and, at that time, seek to join the additional respondent as a party to the proceeding. Since the Code explicitly gives power to a Board of Inquiry to adopt this less attractive mechanism for conducting proceedings relating to the conduct of more than one respondent, the Code should in my view by interpreted as permitting a Board to adopt the expeditious practice of hearing at the same time complaints brought against different respondents where, in the circumstances of the case, the advantages in so doing outweigh the potential prejudice to any party. I do not suggest that this is a case of the greater power including the lesser. Rather,

the existence of the express power adds, in my view, support for the conclusion that the power to hear complaints together should be considered to have been implicitly conferred upon Boards of Inquiry by the Code.

VI

The fourth preliminary objection to be considered is that raised by the respondent union to the effect that the complaints against the union disclose no breach of the Code. Cousel for the respondent union argues, in effect, that even if one accepts the allegations of fact set forth in the two complaints against the union, those facts do not constitute a violation of the Code.

The merits of this objection rest on the proper interpretation of Section 4a (1) of the Code which provides as follows:

> No trade union shall exclude from membership or expel or suspend any person or member or discriminate against any person or member because of race, creed, colour, age, sex, marital status, nationality, ancestry, or place of origin.

It is argued on behalf of the union that this provision deals essentially with "membership practices" and it is further alleged that the complaints of Mr. Hyman relating, as they do, to the union's reluctance to represent him adequately in various grievance processes and with respect to an investigation under the Human Rights Code, do not relate to "membership practices" in the requisite sense. It is argued, in effect, that "representation services" normally provided by the union are not covered by Section 4a (1) as they do not constitute

matters of "membership".

Although it is true that Section 4a (1) does refer explicitly to membership practices in the sense of excluding from membership or expelling or suspending members on prohibited grounds, the section does go on to render it illegal for a union to "discriminate against any person or member" on prohibited grounds as well. It is my view that these general words cannot bear the narrow construction contended for by the union. On the union's view, Section 4a (1) would prohibit the union from discrimination in the charging of fees to its members but would not prohibit the union from discriminating in the provision of those services for which fees have been paid.

Moreover, even if one acceded to the union's suggestion that Section 4a (1) is restricted to so-called "membership practices", there would obviously be considerable difficulty in drawing a line around membership practices and distinguishing from them other activities undertaken by the union. Thus, in argument, counsel for the respondent union conceded that if a union were to restrict access to recreational facilities provided by the union on racial grounds this would amount to a prohibited practice. But if the provision of recreational facilities constitutes a "membership practice", I confess that I am at a loss to discern how it is that access to representational services would not come within the same category.

Counsel for the respondent union further argued that the existence of alternate remedial mechanisms for persons aggrieved by the manner in which their union has represented them suggests that Section 4a (1) should be given

a narrow reading so as to exclude matters of representation from its scope. In particular, reference was made to Section 60 of the Ontario Labour Relations Act, R.S.O. 1970, c. 232, which prohibits unions from acting in a manner that is "arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit ...". Although it is true that an aggrieved member of the union could take a complaint of racial discrimination to the Ontario Labour Relations Board under Section 60, I am not persuaded that the existance of this alternate mechanism precludes the individual from proceeding with a complaint relating to such matters under the Ontario Human Rights Code. In Part IV of this decision, I have indicated a number of the attractive features of the remedial devices established by the Code which make it a more satisfactory instrumentality for enforcing human rights legislation than a grievance arbitration under a collective agreement. For similar reasons, proceeding under the Code may be more attractive to an individual than invoking rights under Section 60 of the Labour Relations Act. In particular, I would emphasize the cost-free aspect of litigation under the Code as far as the complainant is concerned. In the absence of clear indication in either statute to the contrary, I would therefore be reluctant to conclude that members of trade unions are, by virtue of the existance of Section 60, cut off from rights which they would otherwise have under the Human Rights Code and must be left to proceed on their own initiative and at their own expense under Section 60 of the Labour Relations Act.

In summary, then, it is my view that to refuse to provide or to fail to provide in the normal way dispute resolution services to a member on grounds of race of colour would be, in the words of Section 4a (1) of the Code, to

"discriminate against" a member in such a way as to contravene the Code. Accordingly, if it is assumed that the allegations in fact made in the complaints against the respondent union by the complainant are true, it is possible that the conduct of the respondent union contravened the provisions of the Code.

VII

For the foregoing reasons, the preliminary objections of the respondent employer and of the respondent union are dismissed.

Dated at Toronto this 5th day of October, 1981

John D. McCamus
Board of Inquiry